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# The Theoretical and Policy Challenges in Canadian Compensation Law

## **Abstract**

This article examines the traditional torts-based focus of scholarship in Canadian compensation law, notes the growth of theoretical and interdisciplinary speculation in recent years, and considers both the potential for and character of more extended research of the latter types in the future. Comparisons are made with recent trends in compensation law in both England and the United States.

# THE THEORETICAL AND POLICY CHALLENGES IN CANADIAN COMPENSATION LAW

BY JOHN McLAREN\*

*This article examines the traditional torts-based focus of scholarship in Canadian compensation law, notes the growth of theoretical and interdisciplinary speculation in recent years, and considers both the potential for and character of more extended research of the latter types in the future. Comparisons are made with recent trends in compensation law in both England and the United States.*

"Charley? Never heard of a dog named Charley. Hello Charley."

"I wouldn't want you to get in trouble with your boss. Think I ought to drag ass now?"

"What the hell?" he said. "He ain't here. I'm in charge. You ain't doing no harm." "I'm trespassing."

"Know something? Fella camped here, kind of a nut. So I came to kick him off. He said something funny. He says, 'Trespassing ain't a crime and ain't a misdemeanour'. He says it's a tort.

Now what the hell does that mean? He was kind of a nut."

(John Steinbeck, *Travels with Charley*).

## I. INTRODUCTION

This article begins by analysing the deficiencies in Canadian research in both torts and compensation law and attempts to identify the gaps in our knowledge and perceptions. Comparisons are drawn with the record of research in both England and the United States. It then moves on to examine Canadian research in torts and compensation law in the five years since the Consultative Group on Research and Education in Law (the Arthurs Committee) began its work in 1980. It concludes with suggestions on the future challenges to Canadian torts and compensation scholars and some reflections on the logistics of meeting those challenges most effectively. Specific reference is made to recent research trends among English and American scholars.

## II. THE PAST RECORD

To test the impression that Canadian legal research was heavily doctrinal, notably lacking in historical and comparative analysis, and

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devoid of speculation into the philosophical, sociological, cultural, and economic implications of law, the Arthurs Committee surveyed the research techniques of Canadian law professors. The survey revealed that Canadian legal research was essentially law library based, with a heavy emphasis on the doctrinal, a modest focus on theories, and a minimal concern with comparative and interdisciplinary perspectives.<sup>1</sup> Torts suffers as much as other subject areas from the general imbalance identified above.<sup>2</sup>

The picture presented coincides with the writer's view of the state of Canadian research in the law of torts since the mid-1960s. The bulk of writing has been doctrinal and largely confined to the law of negligence. Moreover, within negligence law, the context of the research has been almost exclusively the law emanating from trial and appeal courts. Little has been written about the positive process of settlement. Perhaps because of the flexible and often elusive character of the principles and concepts of negligence law, there has always been a greater concern for theoretical critique in tort law than has been the case in other less yielding and permeable areas of the law. Indeed, much time has been spent on developing theoretical models for stabilizing the shifting relationship between duty of care, breach of duty, and remoteness of damage.<sup>3</sup> Remarkably, however, other issues in negligence have been effectively ignored. Until recently, for example, the law of damages as it applied in negligence cases was sidestepped as judicial 'hocus pocus', below the dignity of or impossible for torts scholars to try to fathom or, more importantly, to influence.<sup>4</sup> Moreover, in negligence law the theorizing has been essentially introspective, with little attempt to employ economic,

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<sup>1</sup> Consultative Group on Research and Education in Law, Social Sciences and Humanities Research Council, *Law and Learning* (Chair: H.W. Arthurs) (1983) at 75-80.

<sup>2</sup> *Ibid.* at 78.

<sup>3</sup> See e.g., J. Fleming, "Remoteness and Duty: The Control Devices in Liability for Negligence" (1953) 31 Can. B. Rev. 471; J.C. Smith, "The Mystery of Duty" in L. Klar, ed., *Studies in Canadian Tort Law* (1977) 1; D. Gibson, "A New Alphabet of Negligence" in A. Linden, ed., *Studies in Canadian Tort Law* (1968) 189; J. Fleming, "The Passing of Polemis" (1961) 39 Can. B. Rev. 489; J.C. Smith, "Requiem for Polemis" (1965) 2 U.B.C.L. Rev. 159; J.C. Smith, "The Limits of Tort Liability in Canada: Remoteness, Foreseeability and Proximate Cause" in A. Linden, ed., *ibid.* 88; J. McLaren, "Negligence and Remoteness — The Aftermath of Wagon Mound" (1967) 32 Sask. L. Rev. 45; D. Gibson, "Wagon Mound in Canadian Courts" (1963) 2 Osgoode Hall L.J. 416; G. Fridman & J. Williams, "The Atomic Theory of Negligence" (1971) 45 Aust. L.J. 117.

<sup>4</sup> There were, however, notable exceptions. See e.g., G. Bale, "*British Transport Commission v. Gourley* Reconsidered" (1966) 44 Can. B. Rev. 66; B. Dunlop, "The High Price of Sympathy: Damages for Personal Injuries" (1967) 17 U. Toronto L.J. 51; K. Cooper, "A Collateral Benefits Principle" (1971) 49 Can. B. Rev. 501; K. Cooper, "Assessing Possibilities in Damage Awards — The Loss of a Chance or the Chance of a Loss" (1973) 37 Sask. L. Rev. 193.

sociological, historical, or philosophical analysis to look through and behind the law.<sup>5</sup>

Outside negligence law the pickings have been slim indeed. While some of the other tort actions have received modest attention, nuisance in particular, others such as the various species of trespass, defamation, and that seemingly peripheral group of economic torts, including deceit, passing off, inducing breach of contract, conspiracy, intimidation, and causing harm by unlawful means, have been largely ignored. This narrow substantive focus parallels what most tort teachers have addressed in the classroom. With the exception of the intentional torts to the person, which have been covered more for their pedagogical value than anything else, negligence law has been 'front and centre' in most curriculums.

The dearth of contextual and policy work on negligence and on the broader panoply of tort actions has reflected the inability of Canadian tort scholars to see their discipline as anything but self-contained and self-generated. There has been a conspicuous lack of 'functional' scholarship — that is, looking first at forms of conflict within society, the interests at stake in these conflicts, and the harms caused, and only *then* asking whether tort law has a legitimate or useful role in their solution. Traditionally, the assumption has been that if tort law has been applied, that disposes of the logically prior and fundamental policy question of whether it is an effective medium for handling the type of conflict at issue. Negligence can be addressed very easily on a relatively narrow doctrinal basis: an approach that may be favoured, because that field so dominates the practice of tort law. Torts like nuisance, defamation, false arrest, and the litany of economic torts that are litigated far less frequently are difficult to tackle without explaining the broader underlying social tensions often beyond the fiftful and capricious reach of tort litigation. The writings of several scholars on the relevance of tort law solutions to privacy and the environment and Professor Weiler's seminal policy analysis of false arrest and defamation excepted, tort scholars have typically kept well clear of these more profound issues.<sup>6</sup>

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<sup>5</sup> Two legal scholars who, to their credit, have applied modes of philosophical analysis to tort law are Professors J.C. Smith and E. Weinrib.

<sup>6</sup> See A. Lucas, "Legal Techniques for Pollution Control: The Role of the Public" (1971) 6 U.B.C.L. Rev. 167; P. Elder, "Environmental Protection Through the Common Law" (1979) 12 U.W. Ont. L. Rev. 107; J. McLaren, "The Common Law Nuisance Actions and the Environmental Battle: Well-Tempered Swords or Broken Reeds?" (1972) 10 Osgoode Hall L.J. 505; P. Weiler, "The Control of Police Arrest Practices: Reflections of a Tort Lawyer" in A. Linden, ed., *supra*, note 3 at 416; P. Weiler, "Defamation, Enterprise Liability, and Freedom of Speech" (1967) 17 U. Toronto L.J. 278.

The absence of concern to explore the social and economic context of the law of torts has been matched by a dearth of empirical study to test its effectiveness in practice. Apart from work such as that of Professor Ison on accident compensation,<sup>7</sup> of Professors R.J. Gray and Sharpe on physicians' attitudes to liability for malpractice,<sup>8</sup> and the Osgoode Studies on automobile accident and criminal injuries compensation,<sup>9</sup> empirical methodology has remained a mysterious craft to torts scholars.

The same hesitancy about asking the more important general social and economic policy questions is also seen in the lack of literature on the relationship between torts and other forms of ordering, providing for, and responding to risks. With the notable and gratifying exception of a group of mainly contracts scholars who have analyzed and developed the law of products liability, including its tort aspects, the interaction of tort, contract, and property has been largely left in cold storage.<sup>10</sup> Similar neglect is noticeable in the relationship between insurance and tort law. This absence of scholarship is particularly remarkable considering that by far the greatest volume of torts cases, those involving automobile accidents, embody a hybrid system of tort loss shifting and insurance loss distribution.

Until recently Canadian tort teachers and scholars have been content to rely on rather sterile English historical analyses of tort law. The Canadian experience and whether it has been, as traditionally assumed, a pale and uncritical reflection of English wisdom, has been ignored. More particularly, there has been no study of the place of tort law within the history of social values and policy within Canada.<sup>11</sup>

Perhaps the most surprising lacuna is in the area of serious comparative work on civil and common law solutions to the compensating of harm in Canada. In a country that has a built-in laboratory for such endeavours, the dearth of comparative scholarship in torts and delict is stark testimony to the inability of scholars to look beyond what is

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<sup>7</sup> T. Ison, *The Forensic Lottery* (1967).

<sup>8</sup> R.J. Gray & G. Sharpe, "Doctors, Samaritans and Accident Victims" (1973) 11 Osgoode Hall L.J. 1.

<sup>9</sup> Osgoode Hall Study on compensation for victims of automobile accidents, *Report* (1965); Osgoode Hall Study on compensation for victims of crime, *Report* (1968). Both studies were carried out under the direction of Professor (now Mr. Justice) Linden.

<sup>10</sup> I refer, of course, to the group led by Professor Ziegel of the University of Toronto, Faculty of Law.

<sup>11</sup> One exception is the work of an historian, M. Piva, on the inadequacy of tort law in the context of industrial accidents. See M. Piva, "The Workmens' Compensation Movement in Ontario" (1975) 1 Ont. Hist. Soc. 39.

familiar, to that which enriches our general knowledge of law, its purpose and functioning, and leads to reform.

If the Canadian research record has been bleak in the area of tort law, it has been dismal in the more general area of compensation law. With the singular exception of Professor Ison, abetted earlier by J.C. McRuer, Otto Lang and, more recently, by Professors Glasbeek and Hasson,<sup>12</sup> Canadian scholars have neither analyzed alternative systems of compensation and social benefits, nor engaged in comparative critiques of the various approaches. The result is an overwhelming ignorance of what the Canadian compensation system is, how it works, and whether it makes any sense, whether in terms of distributive justice or plain economics.

Before the charge is levelled that "he protesteth too much," I should state that the unimpressive picture that I have painted may reflect as much the relative immaturity of academic legal education and scholarship in Canada as any wilful desire to avoid the broader issues. Until the early sixties, both the imperatives of professional formation and the small size of full-time faculties militated against a significant volume of legal research on tort law. Remarkably enough, what scholarship there was, although quite traditional in focus, was of a high quality.<sup>13</sup> With the sixties and the rapid growth in the number of schools and the size of both faculty and student complements, priority was given to filling the gaps in knowledge of the basic principles and concepts, in particular with the demands of the classroom in mind.<sup>14</sup> Canada was not alone in the limited scope of its research into torts and compensation law. These deficiencies formed the basis for the critique by Professor Atiyah of traditional English education and research in the law of torts, which constitutes the preface to his seminal work, *Accidents, Compensation and the Law*.<sup>15</sup> He noted the paradox that the standard English torts course and texts were crammed with material on every conceivable tort, and much information about rules and principles culled from appellate court

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<sup>12</sup> See *supra*, note 7; T. Ison, "Human Disability and Personal Income" in L. Klar, ed., *supra*, note 3 at 425; J. McRuer, "The Motor Car and the Law" in A. Linden, ed., *supra*, note 3 at 303; O. Lang, "The Activity Risk Theory of Tort: Risk, Insurance, and Insolvency" (1961) 39 Can. B. Rev. 531; H. Glasbeek & R. Hasson, "Fault — The Great Hoax" in L. Klar, ed., *ibid.* at 395.

<sup>13</sup> The work of scholars such as C.A. Wright, M.M. MacIntyre, and W.A. Bowker was indeed seminal in laying the groundwork for much of the doctrinal study that followed.

<sup>14</sup> This argument, it must be admitted, did not impress Professors Veitch and R. MacDonald in their critique of scholarly output of Canadian law teachers in 1978. See E. Veitch & R. MacDonald, "Law Teachers and Their Jurisdiction" (1978) 56 Can. B. Rev. 710.

<sup>15</sup> P. Atiyah, *Accidents, Compensation and the Law*, 1st ed. (1970) at 6-9.

decisions, but totally ignored crucial practical aspects of the tort compensation process, such as settlement, as well as the place of tort law within the complex of compensation and income replacement systems devised by both private initiative and the welfare state. Moreover, they did not examine whether the system is fair in the results it produces, and can be justified in economic terms. Implicit in Atiyah's criticisms is that the innate conservatism of English lawyers and legal academics has blinded them to social context.

### III. NORTH AMERICAN COMPARISONS

Tort and compensation law in Canada and England has traditionally compared by and large unfavourably in both quality and quantity with the leading research in the United States. In America there has been for many decades a more probing and intellectually rigorous approach towards scholarship in these areas. As Edward White has pointed out, both torts teaching techniques and scholarship in the United States, after being influenced heavily by 'objective legal theory' with its stress on deductive logic at the turn of the century, were touched by the challenge of the realists to those earlier comfortable notions.<sup>16</sup> This challenge began in the late 1920s and resulted in movement away from a focus on principles and rules towards the emphasizing of facts, context, and policies. The same skepticism about traditional legal principles and rules also manifested itself in the first serious attempt to construct an alternative to the tort system for compensating the victims of automobile accidents: the Columbia Plan.<sup>17</sup>

Even after the Second World War, the notion of balancing interests as a form of 'social engineering' remained strong in tort theory. Prosser, in particular, who had enormous influence on the teaching and researching of torts in the 1950s and 1960s, was able to blend elements of the realist and conceptualist views to provide a conceptual structure, but one that was flexible enough to allow for the careful balancing of interests and the consideration of the broader social policy issues implicit in the particular disputes before the courts.<sup>18</sup> In addition to this more open and inquiring analysis of tort problems, a number of American scholars, for

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<sup>16</sup> E. White, *Tort Law in America: An Intellectual History* (1980) at 63-113.

<sup>17</sup> N.T. Dowling, "Compensation for Automobile Accidents: A Symposium" (1932) 32 Colum. L. Rev. 785.

<sup>18</sup> *Supra*, note 16 at 139-79. See also White's chapter on the contribution to torts theory of Judge Traynor, *ibid.* 180-210.



instance Conard, Robert Keeton and O'Connell, advocated a move away from tort litigation to comprehensive systems of 'no fault' insurance for automobile accidents.<sup>19</sup>

In the 1970s the focus of American scholarship in torts and compensation law changed from the functional, consensus emphasis of Prosser to a new concern with conceptual justification and integrity. However, the approach and its intellectual context is very different from the earlier era of conceptualism in American tort law.<sup>20</sup> First, much of the conceptual writing involves the application of knowledge and methodology from other disciplines, in particular economics, history, and ethics. Accordingly, the search for conceptual truth has proceeded not from within the legal system as it did with Langdell, Holmes, and Ames, but from outside it. Second, there is greater diversity of opinion on both objectives and methodology. Although much of the writing on torts and compensation law in the 1970s reflected the strong strain of individualism in American political and economic thought, some writers, notably Calabresi and Posner, adopted a highly utilitarian approach based on free market economic theory, while others, in particular Epstein and Fletcher, applied ethical theory, in particular the notion of 'corrective justice', to construct theories of liability.<sup>21</sup> These differences in theoretical underpinnings, together with negative reactions from concept skeptics, or those wedded to the more communitarian and instrumental notion of 'distributive justice', mean that within the last few years American torts and compensation scholarship has come to be marked by considerable debate and controversy as scholars not only develop their own positions, but also engage those whose views they find untenable.<sup>22</sup>

#### IV. A NEW WAVE OF SCHOLARSHIP IN CANADA?

Despite the rather bleak picture of Canadian torts and compensation law scholarship that emerges from the Arthurs Report, there were signs

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<sup>19</sup> A. Conard, *Automobile Accidents: Costs and Payments* (1964); R. Keeton & J. O'Connell, *Basic Protection for the Traffic Victim* (1965). See also L. Green, *Traffic Victims, Tort Law and Insurance* (1958).

<sup>20</sup> *Supra*, note 16 at 211-15.

<sup>21</sup> *Ibid.* at 215-30. See G. Calabresi, *The Cost of Accidents* (1970); G. Calabresi & J. Hirschoff, "Toward a Test for Strict Liability in Torts" (1972) 81 Yale L.J. 1055; R. Posner, "A Theory of Negligence" (1972) 1 J. Leg. Stud. 29; R. Epstein, *A Theory of Strict Liability Toward a Reformulation of Tort Law* (1980); G. Fletcher, "Fairness and Utility in Tort Theory" (1972) 84 Harv. L. Rev. 537.

<sup>22</sup> See, for instance, the critique in White, *ibid.* at 230-43; I. England, "The System Builders: A Critical Appraisal of American Tort Theory" (1980) 9 J. Leg. Stud. 27; R. Abel, "A Critique of American Tort Law" (1981) 8 Brit. J. Law & Soc. 199.

that the landscape was beginning to improve as the Arthurs Committee began its work in 1980. As part of a more general pattern of maturation in Canadian legal research, the focus of torts and compensation law was expanding beyond the bounds of traditional doctrinal analysis. Policy issues were being raised more readily and openly in negligence law; both Hohfeldian analysis and principles of moral philosophy were used to establish the criteria of liability in negligence, and some attempts were being made at the type of functional research in tort law both within and outside the parameters of negligence, the application of tort law to both medical malpractice and to environmental problems being two examples.<sup>23</sup>

External developments were also influential. The establishment of the New Zealand Accident Compensation Scheme; the studies of accident compensation in Australia, Britain, and several Canadian provinces, including British Columbia, Manitoba and Ontario; the implementation of a 'no fault' insurance scheme for road accident victims in Quebec following the Gauvin Commission recommendations; and the more general move in North American jurisdictions towards low level 'no fault' benefits all stimulated discussion and some writing on the issue of compensation and how to deal with the adverse consequences of accidents most fairly and effectively.<sup>24</sup>

Furthermore, the movement in the United States to use both economic theory and analysis in liability was exciting interest in Canadian legal academic circles, especially at the University of Toronto where a Law and Economics programme was established. Although historical scholarship on tort and compensation law in Canada had yet to materialize, the application of socio-historical research to civil liability in the nineteenth century, in the United States by Friedman<sup>25</sup> and Horwitz,<sup>26</sup> and in England by Atiyah,<sup>27</sup> and the pioneer work of Professor Risk at Toronto into the development of the law and the economy in nineteenth-century Ontario<sup>28</sup> cumulatively raised interesting possibilities for the application of this methodology to these areas of the law.

The output and pattern of research on torts and compensation law in Canada since 1980 has fulfilled the promise inhering in those trends.

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<sup>23</sup> See E. Picard, *Legal Liability of Doctors and Hospitals* (1977), and *supra*, note 6.

<sup>24</sup> See I. Saunders, ed., *The Future of Personal Injury Compensation* (1978).

<sup>25</sup> L. Friedman, *A History of Law in America* (1973).

<sup>26</sup> M. Horwitz, *The Transformation of American Law 1780-1860* (1977).

<sup>27</sup> P. Atiyah, *The Rise and Fall of Freedom of Contract* (1979).

<sup>28</sup> See especially R. Risk, "The Last Golden Age: Property and the Allocation of Losses in Ontario in the Nineteenth Century" (1977) 27 U. Toronto L.J. 199; R. Risk, "The Law and the Economy in Mid-Nineteenth Century Ontario: A Perspective" (1977) 27 U. Toronto L.J. 403.

A canvass of both texts and articles in periodicals in Canada in the past five years shows that the majority of what is written is still doctrinal or a blend of the doctrinal and theoretical. However, an increasing number of pieces use analytical tools and theory drawn from other disciplines, especially economics and philosophy; they view the law of torts in a more functional context, explore the overlap between torts and other modes of compensation and risk allocation, and examine both the law of torts and compensation law as social phenomena with political, economic, social, historical, cultural, and philosophical contexts and implications.

In the analysis and development of theory, policy issues are increasingly discussed in the context of known facts about the relationship or setting at issue, and don't rely upon impressionistic views which do little more than explain the writers' understanding of the policy factors affecting the courts or the legislatures. Thus, in her important book on the liability of doctors and hospitals, Professor Picard analyses the changing character of the law in the light of medical practice, the institutional realities of the modern hospital, and the expectations of the contemporary patient.<sup>29</sup> Indeed, functional analysis and critique is apparent generally in the increasing body of literature on medical liability.<sup>30</sup> A similar concern with functional context, in this instance the practicalities of professional responsibility in the legal profession, is evident in Professor G.A. Smith's detailed analysis of the law relating to the negligent conduct of litigation.<sup>31</sup> This mode of analysis is not only useful for critiquing the present state of the law, but also generates valuable contextual information for future courts addressing these particular issues of liability, and for legislatures crafting statutes relating to them.

A number of recent articles show an increasing use of philosophical reasoning in policy choices as to liability, the testing of concepts, and the analysis of the actual working of the law by the courts. Professor E. Weinrib has even developed a theory of negligence based on the

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<sup>29</sup> E. Picard, *Legal Liability of Doctors and Hospitals in Canada*, 2d ed. (1984). See also E. Picard, "The Liability of Hospitals in Common Law Canada" (1980-81) 26 McGill L.J. 997.

<sup>30</sup> See e.g., B.M. Dickens, "Legal Approaches to Genetic Diagnosis and Counselling" (1980) 1 Health Law in Canada 25; S. Rodgers Magnet, "Legislating for an Informed Consent to Medical Treatment by Competent Adults" (1980-81) 26 McGill L.J. 1056; W. Bowker, "Minors and Mental Incompetents: Consent to Experimentation, Gifts of Tissue and Sterilization" (1980-81) 26 McGill L.J. 951; M. Somerville, "Randomized Control Trials and Randomized Control of Consent" (1980) 1 Health Law in Canada 58.

<sup>31</sup> G.A. Smith, "Liability for the Negligent Conduct of Litigation: The Legacy of *Rondel v. Worsley*" (1983) 47 Sask. L. Rev. 211.

postulates of Aristotelian and Kantian philosophy,<sup>32</sup> and he has used that theory to argue persuasively for a duty of 'easy rescue' derived from contractual values, which he believes should be acceptable to both the utilitarians and the moral philosophers.<sup>33</sup> In a similar vein Dean, Prichard and Professor Brudner have used Hegel's theory of remedies adroitly to construct a principled approach to deciding whether breach of a statute should give rise to a civil cause of action in tort.<sup>34</sup> Professors J.C. Smith and Coval have employed Hohfeldian analysis and theories of legal and moral obligation effectively to point to the difficulties in providing damages for a 'tort' of discrimination,<sup>35</sup> and Dean Burns and Professor Smith demonstrate the dangers in overextending liability for misfeasance, which they fear will be the result of ill-considered applications of Lord Wilberforce's notion of "assumed duty" in *Anns v. Borough of Merton*.<sup>36</sup> Philosophical analysis clearly assists in the ordered development of principle by inducing careful reflection on reasonable and workable associations of legal and moral obligation, and precise articulation and matching of correlative rights and duties.

The interest in applying economic analysis to torts problems has also emerged recently in the writings of Canadian torts teachers. Thus far, however, its compass has been much narrower, as most of the writing is related to the assessment of damages in negligence cases. The application of a more systematic and principled approach to the award of damages in the trilogy of cases that came before the Supreme Court of Canada in 1978 has turned what was largely a wasteland for research into fertile pastures.<sup>37</sup> Since 1978 Professors Saunders and Cooper-Stephenson have published their work on personal injury damages, which very skillfully addresses the need of practitioners for spurs to creative thinking in the crafting of damage awards, and the interest of academics in critique of the system and suggestions for reform.<sup>38</sup> Two economists, Professors Bruce and Rae, have studied the utility of economic and

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<sup>32</sup> E. Weinrib, "Toward a Moral Theory of Negligence Law" (1983) 2 Law & Phil. 37.

<sup>33</sup> E. Weinrib, "The Case for a Duty to Rescue" (1980) 90 Yale L.J. 247.

<sup>34</sup> R. Prichard & A. Brudner, "Tort Liability for Breach of Statute: A Natural Rights Perspective" (1983) 2 Law and Phil. 89.

<sup>35</sup> S.C. Coval & J.C. Smith, "Compensation for Discrimination" (1982) 16 U.B.C.L. Rev. 71.

<sup>36</sup> P. Burns & J.C. Smith, "The Good Neighbour on Trial: Good Neighbours Make Bad Law" (1983) 17 U.B.C.L. Rev. 93; *supra*, note 35.

<sup>37</sup> See *Andrews v. Grand & Toy Alta. Ltd.*, [1978] 2 S.C.R. 229; *Teno v. Arnold*, [1978] 2 S.C.R. 287; *Thornton v. Board of School Trustees of School Dist. No. 57 (Prince George)*, [1978] 2 S.C.R. 267.

<sup>38</sup> I. Saunders & K. Cooper-Stevenson, *Personal Injury Damages in Canada* (1981).

actuarial evidence in the process of assessment and calculation.<sup>39</sup> Encouraging, too, is the debate and engagement among those who research and speculate upon the award of compensation. Professor Bale, who is strongly committed to a system of comprehensive accident compensation, has ably opened up debate by refusing to accept as an initial premise that all that needs to be done is to make the process of calculation more effective, and arguing that structural changes are needed to allow a torts fund from which periodic payments reflecting the actual ongoing financial needs of the accident victim can be made.<sup>40</sup> Professor Weir in a recent book has detailed one way this can be achieved, that is through the structured settlement, and in the process has revealed much about the claims and settlement process.<sup>41</sup> The emerging dialectic is important if complacency, so often the curse of lawyers, is not to reflect attention from the very real weaknesses in the process of awarding tort damages to which Mr. Justice Dickson himself adverted in his judgment in *Andrews* in 1978.<sup>42</sup>

Notable and welcome exceptions to this concentration on the quantification of damages are Professor Feldthuson's book and articles by Professors Smillie and Cohen on economic negligence. Each of these writers applies economic analyses in dealing with the issue of how far tort liability for purely economic loss should extend.<sup>43</sup>

Interest among torts scholars in using quantitative analysis and empirical methodology to test both the level of coincidence between theory and judicial practice, and the actual impact of judicially articulated principle on individual behaviour is growing, albeit gradually. Professors Smith and Coval together with Ms. Rush have recently demonstrated

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<sup>39</sup> See C. Bruce, "The Calculation of Foregone Lifetime Earnings: Three Decisions of the Supreme Court of Canada" (1979) 5 Can. Pub. Pol'y 155; C. Bruce, "The Introduction of Economic Factors into Litigation Cases: Ontario's 2½ Percent Solution" (1982) 60 Can. B. Rev. 677; C. Bruce, "Four Techniques for Compensating Tort Damages" (1983) 21 U.W. Ont. L. Rev. 1; S. Rea, "Inflation, Taxation and Damage Assessment" (1980) 58 Can. B. Rev. 180; S. Rae, "Inflation and the Law of Contract and Torts" (1983) 14 Ottawa L. Rev. 465. See also P. Boyle and J. Murray, "Assessment of Damages: Economic and Actuarial Evidence" (1981) 19 Osgoode Hall L.J. 1.

<sup>40</sup> See G. Bale, "Encouraging the Hearse Horse Not to Snicker: A Tort Fund Providing Variable Periodic Payments for Pecuniary Loss" in F. Steel & S. Rodgers Magnet, eds., *Issues in Tort Law* (1983) 91. See also G. Bale, "Adding Insult to Injury: The Inappropriate Use of Discount Rates to Determine Damage Awards" (1983) 28 McGill L.J. 1015.

<sup>41</sup> J. Weir, *Structured Settlements* (1984).

<sup>42</sup> *Andrews v. Grand & Toy Alta. Ltd.*, *supra*, note 37 at 236.

<sup>43</sup> B. Feldthusen, *Economic Negligence* (1984); J. Smillie, "Negligence and Economic Loss" (1982) 32 U. Toronto L.J. 231; D. Cohen, "Bleeding Hearts and Peeling Floors: Compensation for Economic Loss at the House of Lords" (1984) 18 U.B.C.L. Rev. 289.

the value of simple quantitative analysis in assessing the utility of tests applied in tort law. In their article, they argue for a new and consistent test for resolving remoteness of damage issues and evaluate the utility of their test against all previously decided negligence cases involving remoteness issues in Canada, England, Australia, and New Zealand.<sup>44</sup> Obviously, before developing a new test of the limits of liability, it is important to assess its likely appeal to the judges. Given the impossibility of canvassing opinion directly, the only workable predictive technique is to examine their track record over a sufficient volume of decided cases. Of considerable significance is Professor Robertson's comment on his survey of the reaction amongst surgeons to the decision of the Supreme Court of Canada in *Reibl v. Hughes*.<sup>45</sup> His careful detailing of the survey and its results shows that claims that are often made for the didactic and preventative role of negligence law may not be nearly as strong as conventional wisdom would have it. Finally, an interesting and provocative challenge to the assertion that deterrence is a negligible factor in tort law and automobile insurance has been thrown down by Professor Bruce in an analysis of scientific literature and statistical data, which he suggests proves the opposite.<sup>46</sup> These instances of the use of empirical methodology point the way to much more that could be done to test the practical import of the cherished and oft repeated assumptions of torts teachers and scholars.

The past five years have also marked an increase in the number of articles that look beyond the law of negligence to other tort actions. In some cases the emphasis is on doctrine and theory. This is true, for example, of Dean Burn's instructive pieces on civil conspiracy and torts injury to economic interests,<sup>47</sup> and Professor Girard's thoughtful comment on the development of a new theoretical basis for nuisance.<sup>48</sup> In other instances the research has a more functionalist flavour to it. This is the case, for instance, with the two pieces on the law of defamation by Professor Robert Martin that examine respectively the use of inter-

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<sup>44</sup> S.C. Coval, J.C. Smith & J. Rush, "'Out of the Maze': Towards a Clear Understanding of the Test for Remoteness in Negligence" (1983) 61 Can. B. Rev. 559. See also M. Litman & G. Robertson, "Solicitor's Liability for Failure to Substantiate Testamentary Capacity" (1984) 62 Can. B. Rev. 457 for analyses of cases involving challenges to wills on the ground of testamentary incapacity and solicitors' negligence as a cause.

<sup>45</sup> G. Robertson, "Informed Consent in Canada: An Empirical Study" (1984) 22 Osgoode Hall L.J. 139.

<sup>46</sup> C. Bruce, "The Deterrent Effects of Automobile Insurance and Tort Law: A Survey of the Empirical Literature" (1984) 6 Law & Pol'y 67.

<sup>47</sup> P. Burns, "Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest" (1982) 16 U.B.C.L. Rev. 229; P. Burns, "Tort Injury to Economic Interests: Some Facets of Legal Response" (1984) 58 Can. B. Rev. 103.

<sup>48</sup> P. Girard, "An Expedition to the Frontiers of Nuisance" (1980) 25 McGill L.J. 565.

locutory injunctions in libel cases, and the problems associated with letters to the editor as the source of defamation actions.<sup>49</sup> Both issues are examined in the broader context of balancing freedom of speech with the need to protect the individual from groundless attacks on his or her reputation. Professor Feldthusen takes a similar approach in his article on judicial immunity from suit in which he balances the value of a judge reaching decisions candidly and fearlessly with the right of individuals to be free from unwarranted or malicious attacks on their reputations.<sup>50</sup>

The functional approach allows the broader questions of the relevance and utility of tort actions in solving pervasive social problems to be posed. More of this functional context work has emerged in the past five years. Good examples are Mr. McIntosh's skillful blending of doctrinal analysis and policy in addressing accidents associated with immunization;<sup>51</sup> Mr. Morrison's article on pesticide poisoning;<sup>52</sup> and the collection of essays on privacy law edited by Professor Gibson.<sup>53</sup> The scope of the last extends well beyond the solutions supplied by tort litigation to equity, administrative, and criminal law, and is prefaced by a philosophical overview of privacy that demonstrates both the intellectual and practical limits of the concept. In the process one gets a far more realistic view of the strengths and weaknesses of tort law as a medium of conflict resolution. The broader comparative approach in these articles and essays is valuable not only in setting out the options, but also in blunting the natural ardour of torts teachers and scholars who tend to assume that this branch of the common law has unlimited potential for improving the human condition.

Alongside the assessment of personal injury damages, the most significant growth area in torts writing relates to the overlap between contract and torts. From an almost complete vacuum (with the occasional reflection that there might be something to the decision in *Hedley Byrne v. Heller & Partners Ltd.*),<sup>54</sup> we have moved to an expanding and increasingly profound body of writing. Valuable doctrinal analysis had

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<sup>49</sup> R. Martin, "Interlocutory Injunctions in Libel Actions" (1982) 20 U.W. Ont. L. Rev. 129; R. Martin, "Libel and Letters to the Editor" (1983) 9 Queens L.J. 88.

<sup>50</sup> B. Feldthusen, "Judicial Immunity: In Search of an Appropriate Limiting Formula" (1980) 29 U.N.B.L.J. 73.

<sup>51</sup> W.K. McIntosh, "Liability and Compensation Aspects of Immunization Injury: A Call for Reform" (1980) 18 Osgoode Hall L.J. 584.

<sup>52</sup> J. Morrison, "Pesticide Poisoning Issues in Personal Injury Liability" (1983) 47 Sask. L. Rev. 97.

<sup>53</sup> D. Gibson, ed., *Aspects of Privacy Law: Essays in Honour of John Sharp* (1980).

<sup>54</sup> *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1864] A.C. 465 (H.L.).

been supplied by Professors Reiter, Bridge, Rafferty, Irvine, Blom, and others.<sup>55</sup> More recently, the theoretical and broader economic and social issues inherent in the relationship between an appropriate scope of agreement, action in reliance, the allocation of risks, and general notions of obligation have come into focus. Professor J.C. Smith has thrown down the challenge to the courts to "develop and refine a set of principles based on reliance which will fill the gap between the traditional law of negligence and the traditional law of contract."<sup>56</sup> Professor Cohen has gone further in the context of liability for pure economic loss and suggested that it is vitally important, lest we get carried away by the lure of accident compensation theory to the detriment of choice and the *ex ante* allocation of risks, to stand back and determine whether the increasing intrusion of tort law into the marketplace, and in particular into the relationship between the consumer and remote supplier, is economically and socially desirable.<sup>57</sup> Applying the tools of economic analysis he concludes that it is not.

Although the change is not nearly so dramatic, there are also signs that interest is stirring in the relationship between tort and insurance law. Professor Weir's work on structured settlements analyses how the annuity concept in life insurance can be used to compensate for a major structural defect in the tort litigation system.<sup>58</sup> Also creative is the call by Professors O'Connell and Brown for a system of no-fault benefits financed not by a state-run scheme of social insurance, but by the assignment of torts rights to liability insurers in return for guaranteed compensation.<sup>59</sup> The plan, specifically related to the Canadian liability context, represents a constructive compromise for achieving greater

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<sup>55</sup> B.J. Reiter, "Contracts, Torts, Relations and Reliance" in B. Reiter and J. Swan, eds., *Studies in Contract Law* (1980) at 235; M. Bridge, "The Overlap of Tort and Contract" (1982) 27 McGill L.J. 872; M. Bridge, "Defective Products Contributory Negligence, Apportionment of Loss and the Distribution Chain — *Lambert v. Lewis*" (1982) 6 Can. Bus. L.J. 184; N. Rafferty, "The Impact of Concurrent Liability in Contract and Tortious Negligence upon the Running of Limitation Periods" (1983) 32 U.N.B.L.J. 189; N. Rafferty, "Concurrent Liability in Contract and Tort: Recovery of Pure Economic Loss and the Effect of Contributory Negligence" (1982) 20 Alta. L. Rev. 357; N. Rafferty, "Liability for Contractual Misstatements" (1984) 14 Man. L.J. 63; J. Irvine, "Contract and Tort: Troubles Along the Boarder" (1980) 10 C.C.L.T. 281; J. Irvine, "Case Comment: *Surrey v. Carroll Haich*" (1980) 10 C.C.L.T. 266; J. Irvine, "Case Comment: *Canadian Western Nat'l. Gas v. Pathfinders Survey Ltd.*" (1981) 12 C.C.L.T. 256; J. Irvine, "Case Comment: *John Maryon Int'l. Ltd. v. New Brunswick Telephone Co. and Ward v. Dobson Construction Ltd.*" (1983) 24 C.C.L.T. 213; J. Blom, "The Evolving Relationship Between Contract and Tort" (1985) 10 Can. Bus. L.J. 257; B. Morgan, "The Negligent Contract Breaker" (1980) 58 Can. B. Rev. 299.

<sup>56</sup> J.C. Smith, "Economic Loss and the Common Law Marriage of Contracts and Torts" (1984) 18 U.B.C.L. Rev. 95.

<sup>57</sup> D. Cohen, *supra*, note 43.

<sup>58</sup> Weir, *supra*, note 41.

<sup>59</sup> J. O'Connell & C. Brown, "A Canadian Proposal for No-Fault Benefits Financed by Assignment of Tort Rights" (1983) 33 U. Toronto L.J. 434.



distributive justice in the compensation system at a time when governments seem reticent about taking the initiative.

While the field of comparative civil — common law analysis still remains largely untitled, articles by Professor Glendon on the relationship between contract and tort in the two systems and by Professor Perret on the substance of the Quebec no-fault automobile insurance scheme at least encourage further speculation.<sup>60</sup> In the comparative context of Canadian and American legal developments, Professor MacCaffery's analysis of approaches to environmental control and regulation in the two countries and its relevance to transboundary pollution is a good example of the practical benefits of the comparative method.<sup>61</sup>

The most encouraging developments in the last five years have taken place in the area of historical analysis. The influence of legal historians in both England and the United States and the seminal work of Professor Risk have borne fruit in historical studies of the social context of both tort and compensation law. Professor Nedelsky in her essay on Canadian nuisance law between 1880 and 1930, the high period of industrial development in this country, has demonstrated the value of relating the development of a body of case law to the social and economic realities of the age.<sup>62</sup> In the process she has suggested the need for skepticism about the extent to which Canadian judges merely parroted the wisdom of their English counterparts. Moreover, she has pointed to further important work that needs to be done on the intellectual and political motivations of the judges who decided the cases analysed. In the same context the present writer has endeavoured in two pieces on legal responses to environmental abuse caused by industrial development to place the role of tort law, especially the nuisance and riparian rights actions, in its proper and modest place.<sup>63</sup>

Professor Risk has produced a splendid history of the weaknesses of the common law in addressing the problem of industrial accidents,

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<sup>60</sup> M.A. Glendon, "Observations on the Relationship Between Contract and Tort in French Civil Law and Common Law" (1980) 11 R.D.U.S. 213; L. Perret, "Le régime de 'No-Fault' integral de la nouvelle loi sur l'assurance" in F. Steel & S. Rodgers Magnet, eds., *Issues in Tort Law* (1983) 51.

<sup>61</sup> S. McCaffery, "Private Remedies for Transfrontier Pollution Damage in Canada and the United States: A Comparative Survey" (1981) 19 U.W. Ont. L. Rev. 35.

<sup>62</sup> J. Nedelsky, "Judicial Conservatism in an Age of Innovation: Comparative Perspectives on Canadian Nuisance Law 1880-1930" in D. Flaherty, ed., *Essays in the History of Canadian Law*, vol. I (1981) 281.

<sup>63</sup> J. McLaren, "Nuisance Law and the Industrial Revolution — Some Lessons from Social History" (1983) 3 Oxford J. Leg. Stud. 155; J. McLaren, "The Tribulations of Antoine Ratte: A Case Study in Environmental Regulation of the Nineteenth Century Canadian Lumbering Industry" (1984) 33 U.N.B.L.J. 203.

and the circumstances surrounding its supersession by the administrative workers' compensation scheme established in Ontario in 1914.<sup>64</sup> Professor Tucker's work on employers' liability and on the genesis of occupational health and safety legislation in Canada is also instructive in terms of social development and the inadequacy of the common law.<sup>65</sup> In a more conservative vein, Professor Bridge has clarified significantly the historical development of tort and contract and so helped define the proper sphere of each.<sup>66</sup>

Finally, the issue "that will not go away,"<sup>67</sup> that of no-fault or socialized insurance, continues to excite and challenge Canadian scholars. Two important texts, by Professor Ison on workers' compensation,<sup>68</sup> and by Dean Burns on criminal injuries compensation,<sup>69</sup> show how these systems work in practice. Dean Burns' work goes further in comparing Canadian models with counterparts elsewhere, and in using quantitative analysis to test the underlying assumptions of this form of compensation. The value of comparative analysis is also evident in the work on the New Zealand Accident Compensation Scheme. Professor Ison's book provides valuable insight into the day-to-day working of the scheme and its strengths and weaknesses,<sup>70</sup> while Professors Klar and Gaskins have developed useful critiques based upon tort theory and the economic values underlying the scheme respectively.<sup>71</sup> At the level of policy analysis as a basis for reform of an existing state compensation system, Professor Weiler's report on workers' compensation in Ontario represents an important contribution to the literature.<sup>72</sup>

Beyond these analyses and critiques, there has been a new call for a far more comprehensive move in Canada to a state-administered system

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<sup>64</sup> R. Risk, "'This Nuisance of Litigation': The Origins of Workers' Compensation in Ontario" in D. Flaherty, ed., *Essays in the History of Canadian Law*, vol. II (1983) 418.

<sup>65</sup> E. Tucker, "The Determination of Occupational Health and Safety Standards in Ontario, 1860-1982: From Market Politics to . . . ?" (1984) 29 McGill L.J. 261 and "The Law of Employers' Liability in Ontario 1861-1900: The Search for a Theory" (1984) 22 Osgoode Hall L.J. 213.

<sup>66</sup> M. Bridge, "The Overlap of Contract and Tort" (1981-82) 27 McGill L.J. 872.

<sup>67</sup> P. Atiyah, "No Fault Compensation: A Question That Will Not Go Away" (1980) 54 Tul. L. Rev. 271.

<sup>68</sup> T. Ison, *Workers' Compensation in Canada* (1983).

<sup>69</sup> P. Burns, *Criminal Injuries Compensation: Social Remedy or Political Palliative for Victims of Crime* (1980).

<sup>70</sup> T. Ison, *Accident Compensation: A Commentary on the New Zealand Scheme* (1980).

<sup>71</sup> L. Klar, "New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective" (1983) 33 U. Toronto L.J. 80; R. Gaskins, "Tort Reform in the Welfare State: The New Zealand Accident Compensation Act" (1980) 18 Osgoode Hall L.J. 238.

<sup>72</sup> P. Weiler, *Reshaping Workers' Compensation for Ontario* (1980).

of first party insurance for all accidents resulting in personal injury. This is the thrust of the well-argued and stimulating report by Professor Belobaba on products liability resulting in personal injury.<sup>73</sup> These works aid both in making useful comparisons between the various elements of the present compensation system, and in suggesting beneficial changes to it.

## V. THE FUTURE

The expansion of focus and the enriching of substance in Canadian research and writing in torts and compensation law evident in the past five years can be expected to continue. A small but growing number of scholars are and will continue to be dissatisfied with confining themselves to traditional speculation. Moreover, the new flame of curiosity is likely to be fanned by both the pluralism in theoretical debate, and the transnational nature of the discussion. Although much of this debate to date has been stimulated by the law and economics movement in the United States, a similar phenomenon is occurring between law and sociology, psychology, history, and philosophy, and this present dialogue is being conducted with genuine enthusiasm and a sense of the importance of intellectual engagement.

Given this intellectual ferment, what areas of torts and compensation law need to be developed further in Canada?

The intrusion of non-legal theory into torts and compensation scholarship in Canada has not yet extended far. Except for the notion of distributive justice in the work of Professor Ison, and Professor Weinrib's use of moral philosophy, we lack the developed and comprehensive theorizing that has marked recent tort law in the United States. There is obviously room for much more work of this sort.

Hopefully, a greater diversity of theoretical approaches will emerge in Canada than was apparent until recently in the United States. Work on tort law there was commonly criticized as reflecting unduly the individualistic strains in the American political, social, and economic tradition and reducing tort law to rationalization in exclusively private law terms. In Calabresi's theory of market deterrence, Posner's quest for the economically efficient result, Epstein's system of corrective justice, or Fletcher's reciprocity theory, the focus has been the same: the adjustment of the position of the individual parties.<sup>74</sup> Moreover, this

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<sup>73</sup> E. Belobaba, *Products Liability and Personal Injury Compensation in Canada: Towards Integration and Rationalization* (1983).

<sup>74</sup> *Supra*, note 16 at 218-30.

objective theory of liability has been found to be somewhat unrealistic, laden with individualistic or free enterprise values, and more a mode of analysis than an explanation of a system of substantive justice. As Professor Englard has observed:

The response of modern American scholarship to the crisis in tort law consists of an extraordinary effort to fashion an improved general theory of liability. These attempts are doomed to failure because in all their present forms they constitute a desperate rear guard action to preserve a traditional system of individualism in a changing world.<sup>75</sup>

There are strong arguments for a more pluralistic climate for speculation on torts and compensation law in Canada. Our political, social, and economic tradition contains definite and important collective strains, and state instrumentalism in the form of legislation and administrative regulation has been readily accepted as a means of achieving greater social justice.<sup>76</sup> Given the disorganized development of the law of torts in particular, and compensation law in general, and the varied objectives they serve, it seems naive to claim that either can be neatly accommodated within a particular theoretical master plan. It makes far more sense to approach the areas in a functional way and to relate theory more closely to the practical objectives served by the law in different situations.<sup>77</sup> This is not to dismiss or devalue the utility of applying theory and analysis of other disciplines, but to use it to improve the compensation system, rather than to dominate it. While Canadians should recognize the value of economic thought and notions of corrective justice in solving compensation problems where considerations of economic efficiency or of individual responsibility demand it, the value of perceptions drawn from other disciplines, especially psychology, politics, and sociology should be recognized, and attention directed to the demands of distributive justice. As we are likely to maintain what Atiyah has described as a mixed system of compensation for the foreseeable future,<sup>78</sup> this diverse approach is essential if what we think is going to bear any relationship with what we do. We would do well to look closely at the new wave of scholarship on tort and compensation law in Britain. It exhibits a diversity of views and a healthy skepticism for theoretical purity, recognizes the value of attempting both to synthesize the research product of different disciplines and to accommodate diverse theoretical positions, and maintains a concern

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<sup>75</sup> Englard, *supra*, note 22 at 68.

<sup>76</sup> See G. Horowitz, *Canadian Labour in Politics* (1968) at 3-22; S. Wise, "Liberal Consensus or Ideological Battleground: Some Reflections on the Hartz Thesis" (1974) *Can. Hist. Assoc. Papers* 1.

<sup>77</sup> *Supra*, note 16 at 230-43.

<sup>78</sup> P. Atiyah, *Accidents, Compensation and the Law*, 3d ed. (1980) at 9-18.

to look beyond tort litigation to alternative ways of achieving distributive justice.<sup>79</sup> It is also important that we recognize and work with the enrichment of theory that flows from the coexistence within our law of both the common and civil law traditions.

There is an additional danger in emulating too closely the neo-conceptualist scholarship in the United States: we may merely generate a closed debate between the keepers of the arcane mysteries involved. I confess to having difficulty in cracking the mind set of the writers of tort law and deciphering the jargon in some of the more 'advanced' theoretical work now appearing. I fear that, unless we recognize that in law theoretical speculation is most valuable where it helps us understand what actually happens in the world, we will progressively be involved in intellectual narcissism, which will divorce us entirely from reality. Our move beyond the narrow confines of traditional legal to interdisciplinary analysis is no guarantee against insularity and undue introspection.

The claim that the law of torts can be reduced to explanation by so-called objective economic or ethical theory is being increasingly challenged not only by the traditional skeptics, but also by progressive and Marxist thinkers. The latter see the present compensation system and the conditions that make it necessary as reflections of the capitalist system, and the solution in changes ranging from the greater socialization of risk avoidance and compensation to social revolution.<sup>80</sup> Like it or not, the claim of conceptual perfection invariably generates challenge and leaves us with competing versions of the truth. A sensible place for Canadians to start may be the wry piece on theoretical pluralism in torts and compensation law by Professors Hutchinson and Morgan.<sup>81</sup>

There is still room for basic doctrinal and theoretical work in a number of fields. Typically these are areas that lie outside the ambit

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<sup>79</sup> See e.g., S. Guest, "The Economic Analysis of Law" (1984) *Current Leg. Prob.* 233; C. Velianovski, "The Economic Approach to Law: A Critical Introduction" (1980) 7 *Brit. J. Law & Soc.* 158; A. Ogus, "Do We Have a General Theory of Compensation?" (1984) *Current Leg. Prob.* 29; M. Davis, "The Road from Morocco: Polemis Through Donoghue to No-Fault" (1982) 45 *Mod. L. Rev.* 534; F. Trinidad, "A No-Fault Scheme for Road Accident Victims in the United Kingdom" (1980) 96 *L.Q. Rev.* 581; W. Bishop, "Economic Loss in Tort" (1982) 2 *Oxford Leg. Stud.* 1; P. Cane, "Justice and Justifications for Tort Liability" (1982) 2 *Oxford J. Leg. Stud.* 30. Of singular importance in this regard is D. Harris *et al.*, *Compensation and Support for Illness and Injury* (1984).

<sup>80</sup> See Abel, *supra*, note 22; R. Abel, "A Socialist Approach to Risk" (1982) 41 *Maryland L. Rev.* 695; R. Pierce Jr., "Encouraging Safety: The Limits of Tort Law and Government Regulation" (1980) 33 *Vand. L. Rev.* 1281.

<sup>81</sup> A. Hutchinson & D. Morgan, "The Canegusian Connection: The Kaleidoscope of Tort Theory" (1984) 22 *Osgoode Hall L.J.* 69. See also B. Chapman, "Ethical Issues in the Law of Torts" (1982) 20 *U.W. Ont. L. Rev.* 1.

of the law of negligence, namely nuisance, defamation, the intentional torts, and the economic torts. All of these areas raise fundamental issues of policy. Underlying nuisance litigation is the broader issue of the conflict between exploitative and conservatory land use and the extent to which each is to be saddled with the external costs of economic development. Defamation cases raise the important issue of the balance between free speech and protection of reputation in a democratic society. The setting of this balance is likely to acquire greater significance since the clear recognition of freedom of speech as a fundamental constitutional value by the *Charter*. The intentional torts, insofar as they overlap with criminal law, create opportunities for speculation on the functions of punishment, deterrence, retribution, and compensation. Moreover, to the extent that questions emerge that relate to the mediation of police powers and the right of the individual to be free from unwarranted arrest and harassment and to be entitled to be fairly treated by the criminal process, public law considerations again intrude. Insofar as the economic torts focus on the industrial relations area, both their functional validity and operation will be affected by considerations of the balance of power in labour management relations, and of how best to moderate conflict within that context.

While there are still gaps in our knowledge of principles, concepts, and rules, we need to fill them in a way that makes us sensitive to the theoretical and policy challenges inherent in these conflicts. Moreover, we need to appreciate the practical limits of tort law as a solution to such conflicts. There is cause for optimism here. An instructive article by Professor Cassels on public nuisance stimulated by the debate over its use as an expedient to deal with annoyance and disturbance caused by street prostitutes,<sup>82</sup> and ongoing work by Dean Burns and Professor Vaver on the economic torts, and by Professor Ray Brown on defamation suggest future extended and intellectually challenging work on the nominate torts.

In the field of negligence law, it is time for more integrated and extensive critical analyses examining the various objectives claimed for liability under this head and the extent to which they are actually realized, applying not only legal but also economic, sociological, political, and philosophical analysis, and viewing negligence law in the context of both tort and compensation law in general. We need to know whether negligence law has the theoretical integrity that some claim for it, or whether theoretical consistency is a myth. Professor J.C. Smith in

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<sup>82</sup> J. Cassels, "Prostitution and Public Nuisance: Desperate Measures and the Limits of Civil Adjudication" (forthcoming, Can. B. Rev.).

his book on negligence law has laid much of the philosophical groundwork.<sup>83</sup> It is encouraging to learn that Professors Saunders and Cooper-Stephenson are working on a book on negligence that will attempt to address and evaluate the economic, sociological, and political values which underlie that area of liability.

Our knowledge of the place of tort law within the more general field of compensation law is primitive. These are signs that the relationship between tort and insurance law is opening up, although clearly much more needs to be done to investigate both the theoretical and practical elements of the relationship. Our knowledge of other systems, such as workers, and criminal injuries compensation, should help us make useful comparisons. Torts scholars and teachers are still woefully ignorant of the relationship between tort compensation and the complex of social benefits available to those who suffer misfortune in our society. Only if someone happens also to teach that 'Cinderella' of courses, Social Welfare Law, is that connection likely to be made and developed. This virgin field of research calls out for extensive work on the comparative analysis of rules, process, and policy.

Empirical research has been largely absent from torts and compensation law scholarship in Canada. As a consequence we are almost totally ignorant of the end results of the various elements of the torts and compensation process. When we pontificate confidently about the effect of injunctive relief or damages awarded in nuisance actions, we do so without any idea of what typically happens thereafter. Does the grant of injunctive relief actually cause polluters to clean up their acts, or do they merely buy out the complainers at a price more favourable to the latter than if no action had been taken or damages awarded? If the latter does happen, it undercuts some of the assumptions that I personally have made about the social engineering function of nuisance law.<sup>84</sup> When we fret over the issue of the extension of liability in negligent infliction of economic loss cases, is our reflection aided by knowledge of the incidence and availability of insurance for business interruption? Rarely do we give the matter any thought. When we carefully craft tortious damage awards for seriously injured plaintiffs, how much do we know about the sufficiency of the amount awarded over the long haul, the cumulation or otherwise of benefits including tort damages, and the record of accident victims in dealing with the lump sum damage awards they

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<sup>83</sup> J.C. Smith, *Liability in Negligence* (1984).

<sup>84</sup> McLaren, *supra*, note 6.

receive? The answer is precious little. We would benefit from more sophisticated economic and actuarial knowledge, yet we know little or nothing of the actual track record of accident victims who have received damage awards. The absence of data on the disposition of tort damages is matched by ignorance of the economic fate of those who receive compensation through other systems, such as workers' compensation. A comparison of the fate of accident victims of the same age with similar injuries and similar economic and educational status at the hands of the tort system on the one hand and the workers' compensation system on the other would be helpful in determining social policy. Thus far this sort of comparative systems research has been totally lacking.

Some momentum has already been achieved in the use of historical research. The importance of continuing the search for the historical record is demonstrated by a recent article from England. The decision in *Rylands v. Fletcher* has puzzled torts scholars for over a century now and every conceivable theoretical justification has been canvassed. Moreover, scholars have speculated on whether the judgment mirrored the conservative values of the judges. Just when one might have thought that the decision had been laid to rest as an unresolved enigma, Professor Brian Simpson has suggested in a masterful piece of historical analysis that the decision to impose strict liability may have been related more to the impact on judicial thinking of major disasters caused by dam failures in Britain in the 1850s and 1860s and legislative reaction to them than conceptual integrity or the power of precedent or legal tradition.<sup>85</sup> While Canadian scholars often tend to assume that our jurisprudence lacks classic cases of this type, there are examples of decisions that warrant this sort of analysis. The Sudbury 'copper smelter' litigation of the 1910s is but one pregnant example. Also, much needs to be done on the history of social legislation that overlaps tort law.<sup>86</sup>

Enough has been said already to suggest that much more comparative research between the civil and common law systems should be carried out in Canada. By way of example it would be fascinating to explore the issue of how far developments within the case law, especially at the Supreme Court of Canada level, are affected by the theoretical predisposition and legal training of the judges who have crafted the court's or the majority's decision in particular cases. Is it, for example, merely aberrational that Pigeon J.'s views on the exclusivity of contract and

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<sup>85</sup> A. Simpson, "Legal Liability for Bursting Reservoirs: The Historical Context of *Rylands v. Fletcher*" (1984) 13 J. Leg. Stud. 209.

<sup>86</sup> Professor Risk has pointed the way here in his essay on workers' compensation. Another important and suggestive piece of social historical analysis is P. Bartrip & S. Burman, *The Wounded Soldiers of Industry* (1983).



tort, as articulated in *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*<sup>87</sup> seemed to fly in the face of common law developments elsewhere or is the truth that his position was entirely consistent with the theory in Quebec law that a party to a contract cannot opt, in the event of a claim for liability, for a delictual rather than contractual action?<sup>88</sup>

The process of comparison should not stop at the common law. Differences in philosophy and social policy are also reflected in legislation and administrative arrangements, and these warrant examination, especially in the context of comprehensive compensation schemes. For example, to determine whether other provinces should adopt more extensive no-fault benefits for automobile accident victims, an important focus of research should be the Quebec scheme and the experience with it in practice.

Traditionally, torts and compensation law scholarship has been a largely individual vocation. However, this pattern is changing; more work is now being carried out by pairs of scholars. This is a desirable trend because it encourages communication between legal scholars, and also opens the door to collaboration between legal researchers and those from other disciplines. Given the broad thrust of much of the needed research, the encouragement of joint effort is crucial. At a time of fiscal restraint in higher education it is unlikely that such initiatives will take place exclusively in specially designated institutes or centres. Accordingly, compensation scholars will have to rely on less formal networking expedients. The Tort Law Section of the Canadian Association of Law Teachers has been successful in the past in encouraging dialogue between and writing by torts scholars. We should assist in securing the funding for joint interdisciplinary research on compensation law. In particular we should work towards the initiation of a programme that will tie together the extensive cross-disciplinary work that can tell us how the present system is working and engender the theoretical brainstorming that will inform proposals for change. The Arthurs Report has created a favourable climate for initiatives of this sort, especially in the Social Sciences and Humanities Research Council. As well, Professor Belobaba has renewed the challenge to us to look seriously at the weaknesses of the present system in relation to personal injury and to respond with creative and sensible prescriptions for change. Moreover, governmental fiscal restraint, together with the structural difficulties of getting country-wide

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<sup>87</sup> [1972] S.C.R. 769.

<sup>88</sup> On the characterization of this question in Quebec Law and an account of the divided state of the authorities, see J.L. Baudoin, *La Responsabilité Civile Delictuelle* (1973) at 15-18.

agreement, make it unlikely that major public research initiatives will be taken. In any event, as the Arthurs Report itself observes, there are advantages in terms of independence and objectivity in not 'hitching our wagon' to government and its priorities. If we wish to encourage interdisciplinary research and to focus on the important social policy issues that surround the compensation of harm, then the challenge is ours to meet!

"Before it gets too dark I've got find a place to park. Know any place up the road where they'll let me stay the night?"

"If you pull over that way behind the pine trees nobody could see you from the road."

"But I'd be committing a tort."

"Yeah, I wish to Christ I knew what that meant."